



Signed and Filed: February 21, 2006

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No: 04-32122-TC
	)	
	)	
MACCON MASONRY MATERIALS, INC.,	)	
	)	Chapter 7
	)	
Debtor.	)	
	)	
	)	
CHARLES E. SIMS,	)	
	)	Adv. Proc. No. 05-3245
Plaintiff,	)	
	)	
vs.	)	
	)	
	)	
MAGDAVE ASSOCIATES, INC.,	)	
	)	Date: February 3, 2006
	)	Time: 9:30 a.m.
Defendant.	)	Ctrm: Hon. Thomas E. Carlson
	)	235 Pine Street
	)	San Francisco, CA

MEMORANDUM RE MOTION TO SET ASIDE DEFAULT JUDGMENT

The court held a hearing at the above date and time on Defendant's motion to set aside default judgment. Charles P. Maher appeared for Plaintiff. Ori Katz appeared for Defendant. Based on the pleadings filed in this proceeding, the arguments of counsel at

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1 the hearing, for the reasons stated in this memorandum, and good  
2 cause appearing therefor, the court denies Defendant's motion.

3 **FACTS**

4       Early in 2002, Defendant was selected by the City of Hayward  
5 as the contractor for building a soundwall at the Hayward Airport.  
6 Debtor was a subcontractor selected by Defendant to supply blocks  
7 for building the soundwall. Debtor supplied the blocks for the  
8 wall. Defendant did not pay for them.

9       In February 2005, Plaintiff, the Trustee for Debtor's chapter  
10 7 bankruptcy case, filed his complaint for account stated, labor  
11 rendered and breach of contract, seeking to recover from Defendant  
12 \$33,076.88. This sum represents the goods supplied by Debtor to  
13 Defendant but not paid for (blocks, mortar mix, molds), plus simple  
14 interest. Defendant did not file a timely response to the  
15 complaint. On April 13, 2005, the Clerk entered Defendant's  
16 default.

17       On June 24, 2005, the court held a status conference in this  
18 proceeding. At the status conference, Defendant's principal  
19 appeared without counsel and made assertions that led the court to  
20 believe that Defendant had a complete defense to this action.  
21 Defendant's principal asserted, for example, that Defendant was not  
22 paid by the City of Hayward on the airport soundwall project due  
23 wholly or in part to Debtor leaving a large number of blocks at the  
24 jobsite after the project was completed. Defendant's principal  
25 also asserted that Defendant had expended considerable sums  
26 removing and storing the blocks, and that Defendant had incurred  
27 additional expense when Debtor caused damage to the storage  
28 facility when it finally removed the blocks from storage.

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1 Defendant is a corporation. In this district, a corporation  
2 is barred from representing itself in an adversary proceedings.  
3 There are no exceptions to this local rule. To enable this  
4 proceeding to be resolved on the merits, the court entered an order  
5 giving Defendant until October 21, 2005 to engage counsel. The  
6 reason the court gave Defendant four months to find counsel is that  
7 Defendant's principal represented that Defendant lacked funds to  
8 pay for counsel, and would need someone to represent the  
9 corporation pro bono.

10 Defendant searched for counsel but did not find counsel who  
11 would represent Defendant pro bono. Accordingly, the court  
12 extended the deadline to find counsel to December 19, 2005. The  
13 court then engaged in efforts to assist Defendant in finding pro  
14 bono counsel, including contacting a Hastings law professor, who  
15 kindly took it upon herself to send an e-mail to graduates of the  
16 Hastings Civil Justice Clinic. On or around the second deadline to  
17 retain counsel, Mr. Katz received this e-mail and performed a  
18 conflicts check to see whether his firm could agree to represent  
19 Defendant. The court very much appreciates the willingness of Mr.  
20 Katz and his firm to represent Defendant.

21 On December 21, 2005, before Mr. Katz made an appearance in  
22 this proceeding, and after the second deadline to retain counsel  
23 had passed, the court entered default judgment against Defendant.

24 On December 23, 2005, Mr. Katz filed a Motion to Set Aside  
25 Default Judgment. Plaintiff opposed the Motion, arguing that  
26 Defendant lacked a meritorious defense, and that Defendant's  
27 conduct had prejudiced Plaintiff by delaying the administration of  
28 the estate and increasing the costs to the estate. Plaintiff asked

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1 the court to deny the Motion to Set Aside, arguing that granting  
2 the requested relief would serve no purpose other than to further  
3 delay administration of the estate. In light of Plaintiff's  
4 opposition, the court continued the hearing on Defendant's Motion,  
5 and ordered Defendant to supplement the record with evidence  
6 supporting Defendant's allegedly meritorious defense.

7 In support of its Motion, Defendant lodged a proposed answer  
8 to the complaint, which asserts eight defenses and a reservation of  
9 rights to assert further defenses. Defendant also filed a  
10 supplemental declaration by its principal and 26 exhibits. This  
11 evidence shows that Defendant has a right to offset some of the  
12 payments owing to Debtor, based on Debtor's overdelivery of  
13 approximately 900 blocks totaling \$3,243. There is no evidence  
14 quantifying Defendant's expenses related to removing and storing  
15 the excess bricks. There is no evidence that Defendant was not  
16 paid by the City on account of the blocks purchased from Debtor and  
17 left behind at the jobsite. Rather, the evidence shows that the  
18 City of Hayward paid Defendant \$96,619 of the amount owing to  
19 Defendant for the project at issue, and that the City held back  
20 only \$2,740.50 owing to Defendant on the project. There is no  
21 evidence that there are other amounts owing to Defendant on the  
22 project that the City has refused to pay.

23 LAW

24 Three factors govern whether a default judgment should be  
25 vacated: (1) whether Defendant's culpable conduct led to the  
26 default; (2) whether Defendant has a meritorious defense; and  
27 (3) whether reopening the default judgment would prejudice  
28 Plaintiff. E.g., TGI Group Life Ins. Plan v. Knoebber, 244 F.3d

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1 691, 696 (9th Cir. 2001). This test is disjunctive, meaning that  
2 finding the presence of any one of these factors justifies denial  
3 of a motion to vacate a default judgment. E.g., Hammer v. Drago,  
4 940 F.2d 524, 526 (9th Cir. 1991). Doubts should be resolved in  
5 favor of setting a default judgment aside. Civic Center Square,  
6 Inc. v. Purina Mills (In re Roxford Foods, Inc.), 12 F.3d 875 (9th  
7 Cir. 1993).

8       There is nothing in the record to suggest culpable conduct by  
9 Defendant or prejudice to Plaintiff. There is no evidence that  
10 Defendant deliberately failed to obtain counsel to gain a  
11 litigation advantage, or that reopening the default judgment would  
12 prejudice Plaintiff by, for example, lost evidence or increased  
13 discovery difficulties. TGI Group Life Ins. Plan v. Knoebber, 244  
14 F.3d 691 (9th Cir. 2001).

15       The court finds, however, that Defendant does not have a  
16 meritorious defense. The evidence Defendant provided to support  
17 its defense is very different from the evidence that would be  
18 required to prevail on the asserted defenses. The Defendant was  
19 only able to establish a defense for ten percent of the default  
20 judgment, based on blocks delivered by Defendant and not ordered by  
21 Plaintiff. While Defendant is entitled to an offset for this sum,  
22 it is appropriate to condition setting aside the judgment as to  
23 this amount on Defendant's payment of Plaintiff's reasonable  
24 attorneys fees in obtaining the default judgment, and in opposing  
25 Defendant's efforts to set it aside. Nilsson, Robbins, Dalgarn,  
26 Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1546  
27 (9th Cir. 1988). Because the reasonable attorneys fees that the  
28 court would award to Plaintiff as a condition for partially setting

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1 aside the judgment are likely greater than the amount by which the  
2 judgment should be reduced, the court denies Defendant's Motion.

3 **\*\*END OF MEMORANDUM\*\***  
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